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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of MARIA DEL CARMEN and LUIS CARLOS CORRALES.	
MARIA DEL CARMEN SANTANA, Respondent, v. LUIS CARLOS CORRALES, Appellant.	G039855 (Super. Ct. No. 01D004483) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard G. Vogl, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed with directions.

Nicolas J. Estrada for Appellant.

Malhotra & Malhotra, Evangelina J. Malhotra; and Howard C. Posner for Respondent.

* * *

Luis Carlos Corrales appeals from the final judgment in his dissolution action. He seeks reversal of child custody and visitation orders, claiming the family court violated his due process rights by conducting a hearing in these matters in his absence without notice. For the reasons expressed below, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

We cannot provide a full description of the procedural history of this case because Luis[1] has not provided us with a complete record of the proceedings below. Luis provides us only with a clerk's transcript containing a family law docket report, the November 29, 2007, judgment, the December 4, 2007, notice of entry of judgment, and the notice of appeal, and also supplies a partial reporter's transcript.

The incomplete record reflects that Maria Del Carmen Corrales petitioned to dissolve the couple's marriage in May 2001. On April 21, 2006, Luis appeared in court with Attorney John Oh.[2] Following discussion of matters unrelated to child custody, the court addressed the issue of Luis's failure to file the requisite financial disclosure statement, and assessed monetary sanctions against him. Maria's lawyer noted a hearing on child custody and support was scheduled for the following Tuesday, and asked the court to advance the hearing because Luis's attorney had petitioned to be relieved as counsel. The court noted it had not seen counsel's petition, and asked if the parties agreed to continue the trial. Luis's counsel stated he had filed the petition that morning with a hearing date of June 2, and asked the court to continue the trial until after

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[1] We refer to the parties by their first names for clarity and ease of reference and intend no disrespect. (*In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1)

[2] Counsel represented at oral argument Luis was not present, but at page 32 of the reporter's transcript the record reflects: "MR. CORRALES: I would like to speak. [¶] THE COURT: No, sir. We have four attorneys here. That's what they are all paid for." A minute order in the superior court file also reflects that Luis attended the hearing.

that date. Maria's counsel stated she was ready to proceed and preferred to resolve the issue, but the court agreed to continue the trial on custody and visitation to August 8, 2006. The court advised Luis: "attorney or no attorney, it will go forward."

The next hearing reported in the partial reporter's transcript is November 5, 2007. Luis did not appear personally or through counsel. The court stated, "It is my understanding this was properly set for hearing, and we will proceed with the trial." A lawyer appointed for the couple's son asked to be relieved from further duties in the case, stating there was an existing order sufficient to protect the child. The court adopted the child protective orders and released counsel from further representation. Because the court adopted the interim order, minor's counsel stated he would not make an offer of proof or submit evidence on the issue. Later, the court invited Maria to submit a "proposed judgment in regard to default as to the other issues," including child custody.

On November 29, the parties appeared in court, with Luis representing himself. He did not raise the issue of defective notice or complain he had been unaware of the November 5 trial. The court noted that in April 2007 it had sanctioned Luis by precluding him from presenting evidence at trial "regarding the issues which would have been addressed by the statutory preliminary declarations of disclosure . . . ." Maria's counsel recounted the court subsequently set the matter for trial on November 5 and 6, but when Luis failed to appear, the court ordered her to prepare a "default" judgment. Maria's counsel offered to "do any prove up" the court desired. She stated the "paperwork is quite extensive, and the declarations are there. But it's [Maria]'s position[] . . . that [Luis] should not have any role to play in this proceeding today."

The court stated it had set the matter for hearing on November 29 "to the extent [Luis] did arrive at the earlier hearing, was because I was not certain, and as I sit here now, I do not know whether the judgment contains provisions other than that which was precluded by [the court's April 2007] order." The court suggested it read the judgment with the understanding "he's precluded from submitting any evidence upon

certain issues. It may be that there are issues here for which he is not precluded. I just don't know." The court directed Maria's counsel to lend Luis a copy of the judgment and directed Luis to review it and advise the court what "issues that you believe you can give evidence . . . based on the [April 2007] order[]." The court stated it would "call the matter again — [¶] [w]hen [Luis] tells us when he's ready. [¶] Sir I want you to be ready by 10:15. We will proceed without you if you're not here at that time." The reporter's transcript reflects the "parties did not come back on the record on this case again" and that the proceedings were concluded.

The dissolution judgment signed and filed on November 29, 2007, awards Maria sole legal and physical custody of the couple's son, born in 1993, and permits Luis professionally supervised visitation "[u]ntil further order of the court" on alternate Saturdays from noon to 6:00 p.m. and alternate Fridays from 6:00 to 9:00 p.m. The order further provides that "[e]vidence has been presented in support of a request that the contact of [r]espondent with the child[] be supervised based upon allegations of . . . drug abuse [and] domestic violence." The judgment reflects the final order adopted a pendente lite child custody order of January 11, 2006. It also notes the proceeding was heard as a default or uncontested matter.

II

DISCUSSION

A. *The Record Does Not Support Luis's Claim He Was Denied Notice or Opportunity to be Heard on Child Custody and Visitation Issues*

Citing the court's April 2006 directive trial would go forward on the continued date regardless whether Luis had an attorney, Luis argues "it should be questioned whether the judge . . . should have inquired of Attorney Oh *sua sponte* as to whether he had maintained contact with [Luis] . . . in order to ensure that [Luis] would be aware of . . . upcoming proceedings . . . . And even if the judge did so inquire, the attorney would be negligent for not having inquired of his client or notified him of court

dates. [¶] It would seem that either the judge or the attorney had committed an error in this regard." (Original italics.) Luis's failure to provide an adequate record to support his due process claim of defective notice requires us to affirm the judgment.

On appeal, we presume the trial court's judgment is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) It is the burden of the party challenging a judgment on appeal to provide an adequate record to assess whether the trial court erred. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) Thus, an appellant must support arguments with appropriate citations to the material facts in the record. A reviewing court must affirm the judgment if an appellant fails to provide an adequate record. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) An incomplete record that does not show whether the trial court erred is not the equivalent of demonstrating error. (*Crummer v. Zalk* (1967) 248 Cal.App.2d 794, 796.) Our review is limited to determining whether any error "appears on the record." (*Bond v. Pulsar Video Productions* (1996) 50 Cal.App.4th 918, 924.)

Here, the record reflects Luis was present in April 2006 when the court advised the parties a two-day trial encompassing custody issues would commence in August 2006. Luis did not appear on November 5, 2007, when the child custody issues were resolved. The record supplied by Luis does not reflect what occurred in the interim. We note a trial court may try a matter to judgment in the absence of the nonappearing party who has received notice. (See Code Civ. Proc., § 594.) There is nothing in the record demonstrating Luis did not receive actual notice of the November 5 trial date. We may presume Luis received legally sufficient notice of the trial and elected not to appear. (Evid. Code, § 664.) We also note that on November 29, Luis did not object that he had not received notice of the trial.

Luis cites Code of Civil Procedure section 657 in arguing there was irregularity in the proceedings preventing him from having a fair trial, as well as

"accident or surprise" that warrants a new trial. This provision sets forth the grounds for obtaining a new trial. As he notes, the statute provides a remedy in the trial court, one he did not pursue. Nor did Luis move to set aside the judgment based on mistake, inadvertence, surprise, or excusable neglect (Code Civ. Proc., § 473). Finally, the court provided Luis with an opportunity to present any evidence he had concerning issues encompassed within the proposed judgment. He did not object to the custody order, nor did he attempt to present evidence on the issue.

In sum, while we may assume the family court granted Oh's motion to withdraw as Luis's lawyer because Maria does not dispute this assertion, there is nothing in the record showing Luis did not receive notice of pending court dates, or that Luis was not apprised of the November 5 trial date. The limited record suggests Luis had a pattern of voluntarily absenting himself from the proceedings. As the court remarked in October 2005, "A few times he appears kind of like a Leprechaun. He is here or he is not here." The record fails to support Luis's claim the court erred or violated his due process rights.

Finally, we obtained and reviewed the superior court file and it shows Maria's counsel filed notice in June 2007 that trial was continued from July 9 to 13, 2007, to November 5 to 6, 2007. She filed a proof of service reflecting service by mail on Luis in pro. per. at Luis's address of record in Garden Grove on Tunstall Street. The superior court file also contains the court's May 1, 2008, statement of decision, which reflects Luis did appear on the second day of trial, November 6, 2007.

B. *Maria Is Entitled to Sanctions for a Frivolous Appeal*

Maria filed a motion for sanctions against Luis on the grounds the appeal is frivolous. Section 907 of the Code of Civil Procedure permits recovery of costs when an appeal is "frivolous or taken solely for delay," and rule 8.276(a)(1) of the California Rules of Court permits the imposition of sanctions, including costs, for "[t]aking a frivolous appeal or appealing solely to cause delay." An appeal is frivolous "when it is

prosecuted for an improper motive — to harass the respondent or delay the effect of an adverse judgment — or when it indisputably has no merit — when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650; *DeRose v. Heurlin* (2002) 100 Cal.App.4th 158, 179.)

Here, Luis's appeal "indisputably has no merit." The superior court file showed Luis received notice, actually appeared on the second day of trial, and never claimed in the trial court he had not received notice of the trial. Luis cites code sections that have no application on appeal, fails to present cogent appellate arguments supported by legal authority and, most significantly, fails to provide an adequate record to resolve the "issues" presented on appeal.

Maria seeks an award of $17,240, which is twice the amount of her attorney fees for the appeal. In Maria's sanctions motion, Attorney Howard Posner declares he will have spent 20.6 hours on the appeal after oral argument. Attorney Evangelina Malhotra filed a declaration stating she has spent 5.5 hours on the appeal and that she billed her client $325 an hour for Posner's services, and her own billing rate is $350 an hour.

In deciding the appropriate amount of sanctions, courts may consider the amount of respondent's appellate attorney fees, the amount of the judgment against appellant, the degree of objective frivolousness and delay, and the need to discourage like conduct in the future. (*Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 342.) Generally, the amount of attorney fees incurred by opposing the appeal, together with recovery of costs on appeal, is the appropriate amount to impose as sanctions for a frivolous appeal. (*Harris v. Sandro* (2002) 96 Cal.App.4th 1310, 1315.) Accordingly, we limit the imposition of sanctions to the actual amount Maria incurred in legal fees on appeal.

Sanctions may be imposed "on a party or an attorney" (Cal. Rules of Court, rule 8.276(a); *Portola Hills Community Assn. v. James* (1992) 4 Cal.App.4th 289, 294,

disapproved on other grounds in *Nahrsted v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 386.) Here, Luis bears responsibility for counsel's action in prosecuting an appeal based on a patently inadequate record. It also appears counsel's conduct in pursuing this appeal without an adequate record warrants sanctions, especially considering the documents in the court file that should have been included in the record reveal Luis received notice and attended a portion of the trial. We assume counsel, acting as a diligent and competent advocate, examined the record and was aware of this information. Because the record clearly did not support a claim of lack of notice, counsel had a professional obligation not to pursue the appeal. Suffice it to say "[o]ur courts are not obliged to provide a forum for litigation that has no objective chance of success." (*Neufeld v. State Bd. of Equalization* (2004) 124 Cal.App.4th 1471, 1477.) Accordingly, we impose sanctions against both Luis and appellate counsel, leaving it up to Luis and his lawyer to determine "'how responsibility for the expenses should be allocated between client and counsel.'" (See *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 28, fn. 6.)

III

DISPOSITION

The judgment of the trial court is affirmed. Luis Carlos Corrales and Luis's counsel Nicolas J. Estrada are hereby jointly and severally ordered to pay sanctions to Maria in the amount of $8,620. Maria is also entitled to her appellate costs. The clerk is directed to notify the State Bar of California of the sanctions imposed by this opinion.

(Bus. & Prof. Code, § 6086.7, subd. (a)(3).) This opinion shall serve as notice to counsel the matter of the sanctions imposed has been referred to the State Bar. (Bus. & Prof. Code, § 6086.7, subd. (b).)

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.